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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant,

vs.

RILEY C. GARNER, County Trustee of Shelby County, Tennessee, and SHELBY COUNTY, TENNESSEE.

No. 460

PETITION TO REHEAR

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TO THE HONORABLE JUDGES OF THE SUPREME COURT:

Comes now the Appellant and respectfully prays the Court to rehear the matters determined in its judgment of January 2, 1952, which is:

> "*PER CURIAM*: The appeal is dismissed for the want of a substantial federal question."

It is the respectful insistence of the Appellant that the questions raised on appeal present substantial federal questions.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

(A). THE SUPREME COURT OF THE STATE OF TENNESSEE CONSTRUED SECTION 1535 OF THE CODE OF TENNESSEE AND RELATED STATUTES TO SANCTION THE SEIZURE OF APPELLANT'S PROPERTY UNDER DURESS FOR FAILURE TO PAY A TAX THAT WAS NOT LEVIED AND WAS NOT DUE AND COULD NOT HAVE BEEN PAID BY APPELLANT UNDER PROTEST OR OTHERWISE.

We regard as extremely "substantial" the question of whether a penalty can be assessed and collected against a taxpayer who never had any opportunity to pay the tax upon which the penalty was assessed. That is exactly what happened in this case. Under the Tennessee Statutes, which are summarized in the Second Amended and Supplemental Bill, and in the Jurisdictional Statement, pp. 1-6, no tax is levied and there is no opportunity for payment until the State Board of Equalization certifies its assessment of the total valuation of taxpayer's property subject to taxation to the Railroad and Public Utilities Commission nor thereafter until the Railroad and Public Utilities Commission computes the value of property subject to local taxation in each county and municipality and certifies the amount to each. Then and only then can the taxpayer ascertain the amount of the tax due, obtain a tax bill, make payment and get a receipt from the collecting authority. In this case the taxes were never due and payable and the doing of the act necessary to make the taxes payable was enjoined by the U. S. District Court and thereafter the *assessment* was, by the final judgment of a court of competent jurisdiction, de-

clared to be null and void and the assessment quashed. At no time were the collecting officers in position to notify the appellant of the amount of tax due, accept payment thereof and issue a receipt. Immediately the question arises, what did this taxpayer do or fail to do to justify the imposition of a penalty? The record does not furnish an answer.

It does not require citation of authority to establish the proposition that a penalty may not be imposed except for some wrongful act or omission and indeed the proposition is so elemental that no litigation has arisen to create jurisprudence on the identical question. Since Magna Charta, it has been settled that "no man ought to be taken or imprisoned * * * or deprived of his life, liberty or property but by the judgment of his peers, or by the law of the land." What "law of the land" did the appellant violate to justify the imposition of the penalty? It is true that the appellant successfully questioned the assessment, but the injunction against the levy and the subsequent quashing of the entire assessment were not the acts of appellant. The judgments of courts are not the acts of the parties but judgments are, as Blackstone puts it, "the very voyce of law and right." Moreover, to impose a penalty for seeking and obtaining relief has always been held by this Court to be a deprivation of property without due process of law. Many penalties imposed upon *unsuccessful* litigants seeking a determination of their rights have been stricken down, and diligent search fails to disclose a single case where a penalty has been imposed against a *successful* litigant. The general jurisprudence on this subject is voluminous but the following cases illustrate the principle announced by the Court.

Ex Parte Young, 209 U.S. 123;

Ward v. Board of County Commissioners, 253 U.S. 17, 64 L. Ed. 751;

Carpenter v. Shaw, 280 U.S. 363, 74 L. Ed. 478;
McFarland v. Central Natl. Bank, 26 F. 2d. 890;

Security National Bank of Watertown v. Young 55 F. 2d 616;

54 Am. Jur. United States Court, Sec. 8;

Herndon v. Railway Co., 218 U.S. 135, 54 L. Ed. 970;

Western Union Telegraph Company v. Julian, 169 Fed. 166;

Seaboard Air Line Railroad Co. v. Alabama Railroad Commission, 155 Fed. 792.

If the rule is to be announced that a taxpayer who successfully contests its tax liability and who pays the tax when lawfully assessed and at the first opportunity after the tax is levied is to be penalized for successfully questioning the original assessment, it is more than "substantial"—it is cataclysmic and we believe that it was only the insufficiency of advocacy that failed to impress the Court with the importance of the question.

(B). THE SUPREME COURT OF THE STATE OF TENNESSEE, IN CONSTRUING SECTION 1535 OF THE CODE OF TENNESSEE AND RELATED STATUTES, HELD THAT APPELLANT MIGHT BE REQUIRED TO PAY A PENALTY FOR FAILURE TO PAY A TAX WHICH, ADMITTEDLY, HAD NOT BEEN ASSESSED IN CONFORMITY WITH LAWS OF THE STATE OF TENNESSEE.

In this case we are not dealing with the question of excise or franchise taxation but with the question of ad valorem taxation. Excise and franchise taxes are self-executing and mere exercise of the franchise or excise results in liability for the tax. Ad valorem taxation involves entirely different principles. Liability for the tax does not depend upon mere ownership of the property but upon an *assessment* and a *levy*. As demonstrated in the previous section, there never was at any time a levy and the property never became subject to the varying rates imposed by the several counties and municipalities. The assessment was declared to be void and was set aside by the final judgment of a court of competent jurisdiction, which final judgment is in full force and effect and unappealed from. In cases of ad valorem taxation the collection of interest, penalties or, indeed, of the tax itself, in the absence of a valid assessment, is unconstitutional.

51 Am. Jur., Taxation, Sec. 647;

61 C. J., Taxation, Sec. 759 b;

2 Cooley, Constitutional Limitations, 1108 (8th ed., Carrington);

Judson, Taxation, Sec. 496.

Commonwealth v. Chesapeake O. & S. R. Co., 141 Ky. 633, 135 S. W. 559;

Freiberg Co. v. Dawson, 274 Fed. 420;

Tumulty v. District of Columbia, 102 F. 2d. 254;

C. B. & Q. R.R. Co. v. Chicago, 166 U.S. 226;

County of Santa Clara v. Southern Pacific Railroad Co., 118 U.S. 394, 30 L. Ed. 118;

Malone v. Williams, 118 Tenn. 390.

Territory v. Perea, 62 Pac. 1094.

Dravo Contracting Co. v. James, 11 F. 2d. 242, 147 A.L.R 135.

Marr v. Enloe, 9 Tenn. 451.

We believe this question to be substantial.

(C). THE SUPREME COURT OF THE STATE OF TENNESSEE, IN ITS DECISION CONSTRUING SECTION 1535 OF THE CODE OF TENNESSEE AND RELATED STATUTES TO PERMIT THE IMPOSITION OF A PENALTY FOR SUCCESSFULLY RESORTING TO THE COURTS OF THE UNITED STATES TO OBTAIN RELIEF AND IMPOSED A PENALTY UPON APPELLANT FOR OBTAINING ADEQUATE RELIEF UNDER THE LAWS OF THE UNITED STATES INSTEAD OF BEING CONTENT WITH THE LIMITED AND INADEQUATE REMEDIES PROVIDED BY SAID SECTION 1535 OF THE CODE OF TENNESSEE.

At the time the tentative assessment was made against the taxpayer it had two alternatives available. One was to sit idly by and wait until the assessment was extended and the levy made by the various counties and municipalities and thereafter pay the taxes under protest and file some forty separate suits for the recovery of the tax. This would have required a multiplicity of actions with no certain hope of recovery, for it is well known that judgments against counties and municipalities are frequently uncollectible. The other alternative was to enjoin the extension of the taxes and have the assessment quashed. This latter course the taxpayer successfully pursued. The Supreme Court of Tennessee has now said that no penalty would have been assessed had the tax-

payer followed the first alternative but a penalty has been assessed for successfully resorting to the courts to obtain exactly the same ultimate relief. It is not only "substantial" but, as far as we are able to find, unprecedented to permit a penalty to be assessed against a litigant for successfully resorting to legal remedies. The effect of the decision of the Supreme Court of Tennessee is to say that, if the remedy prescribed by Section 1535 of the Code of Tennessee had been pursued, no penalty would have been assessed but, because the same relief was obtained by resorting to the courts of the United States, a penalty will be assessed. This is contrary to any previous adjudications of this Court.

Security National Bank of Watertown v. Young, 55 F. 2d. 616;

Ward v. Board of County Commissioners, 253 U.S. 17, 65 L. Ed. 751;

Carpenter v. Shaw, 280 U.S. 363, 74 L. Ed. 478;

McFarland v. Central Natl Bank, 26 F. 2d. 890;

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Herndon v. Railway Co., 218 U.S. 135, 54 L. Ed. 970;

Western Union Telegraph Company v. Julian, 169 Fed. 166;

Seaboard Air Line Railroad Co. v. Alabama Railroad Commission, 155 Fed. 792.

(D). THE SUPREME COURT OF THE STATE OF TENNESSEE REPUDIATED AND REFUSED FULL FAITH AND CREDIT TO THE FINAL JUDGMENTS OF THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE, AND OF THE UNITED STATES DIS-

TRICT COURT AT NASHVILLE, EVEN THOUGH SAID JUDGMENTS HAD BEEN ENTERED IN THE SAME CAUSE, BETWEEN THE SAME PARTIES AND NO REVIEW OF SAID JUDGMENTS WAS SOUGHT BY ANY PARTY AT ANY TIME.

The United States District Court in issuing the injunction adjudged that Section 1535 of the Code of Tennessee did not provide the sole and exclusive remedy available to a taxpayer confronted with a void assessment. The Circuit Court of Davidson County, Tennessee, in its final judgment quashing the assessment made the same adjudication. No appeal was sought. Shelby County, the appellee, notwithstanding these judgments, collected under duress the penalty which forms the basis of this suit, making the contention that the failure of the appellant to follow Section 1535 of the Code of Tennessee was wrongful notwithstanding that the United States District Court at Nashville and the Circuit Court of Davidson County had both adjudicated that Section 1535 of the Code of Tennessee *did not* furnish the sole and exclusive remedy under the facts of this particular case. To sustain the contention of Appellee is contrary to the previous adjudications of this Court.

Chicago Cemetery Association v. United States, 19 F. Supp. 228, 50 C.J.S., p. 11;

Cooley, Constitutional Limitations, Vol. 1, p. 108;

Cooley, Constitutional Limitations, Vol. 2, Chapter 11 p. 733;

Twining v. New Jersey, 211 U.S. 78, 53 L. Ed. 97;

Embry v. Palmer, 107 U.S. 20, 27 L. Ed. 456;

Turnbull v. Payson, 95 U.S. 418;

Leadville Coal Co. v. McCreery, 141 U.S. 475, 35 L. Ed. 824.

This question is substantial. If the decision of the Supreme Court of Tennessee is to stand, it amounts to a holding that the doctrine of res judicata, which has been a part of the common law since the decision of the Duchess of Kensington's Case, can be abrogated without denying due process of law, and it further means that a state court can, in a collateral action disregard the decision reached in the United States District Court in the same matter between the same parties.

SUMMARY.

We confidently assert, after the most extended legal research of which we are capable, that with the exception of the opinion of the Supreme Court of Tennessee in this case, not a single case can be found in any jurisdiction that sustains *any* of the following conclusions:

(a) Permits the imposition of a penalty where the taxpayer never had an opportunity to pay the tax.

(b) Permits the collection of ad valorem tax, penalty or interest in the absence of a valid assessment.

(c) Permits the imposition of a penalty of successfully obtaining judicial relief against injustice by *successfully* pursuing remedies of the taxpayer's own choosing rather than pursuing other remedies which, in the opinion of the taxpayer, were inadequate.

(d) Sanctions the refusal of full faith and credit to the final judgments of courts of competent jurisdictions in the same cause and between the same parties, which final judgments were never questioned on appeal by any party.

No authority can be found to sustain *any* of these propositions, but the opinion of the Supreme Court of Tennessee approves *all* of them.

In the Jurisdictional Statement no attempt was made to argue the substantiality of these questions because, as we construed the rules of the Court, citation of authorities is not invited except only those cases which sustain the jurisdiction of the Court. The Rules of the Court (Rule 12) direct the citation of cases believed to sustain jurisdiction but do not invite the citation of other authority. We believe that, if permitted to do so, we can convince the Court by brief and argument that the appellant has been deprived of its property without due process of law.

Respectfully submitted,

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Memphis, Tennessee,
Attorneys for Appellant.

CERTIFICATE.

The undersigned, being duly sworn, says that he is one of the attorneys for the appellant, that the sum in controversy is already in the possession of the appellee and has been since the institution of the action, that there is no reason for the appellant to seek delay and that the purpose of this petition is not to delay a final determination of the cause, and that copy of the above petition to rehear was served by United States mail upon the Honorable Lake Hays, counsel of record for appellee, this the.....day of January, 1952.

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Sworn to and subscribed before me this.....day of January, 1952.

.....
Notary Public in and for
Shelby County, Tennessee

My Commission expires

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